Water Pollution Control Advisory Council (WPCAC) Meeting
August 26, 2004 9:30 a.m.-12:15 a.m.
Director's Conference Room 111 Metcalf Building

Attendees:

Council Members:
Terry McLaughlin, Smurfit-Stone Container Corp.
Barbara Butler, Billings Solid Waste Division
John Schwarz, Schwarz Architecture & Engineering Inc.
Scott Seilstad
Peggy Trenk, Montana Assn of Realtors
Bill Griffin
Shannon Dunlap, Golden Sunlight Mines, Inc.
Robert Willems, Soil & Water Conservation District

Other Attendees:
Bob Bukantis, Department of Environmental Quality (DEQ)
Bonnie Lovelace, DEQ
Jon Dilliard, DEQ
Tom Reid, DEQ
John Arrigo, DEQ
Moriah Peck, DEQ
Eugene Pizzini, DEQ
Steve Pilcher, Montana Stock Growers Association

Call to Order

Chairman Terry McLaughlin called the Water Pollution Control Advisory Council meeting to order on August 26, 2004 at 9:30 a.m. A round of introductions was conducted.

Approval of Agenda

Terry McLaughlin said Bob Bukantis asked for five minutes to give a briefing on impending suction dredge rule. It has been proposed to insert the suction dredge rule briefing item after the 10:30 a.m. agenda item. Are there any objections to the addition? Being there are no objections, the suction dredge rule briefing will be inserted into the agenda.

A motion to approve the agenda with the addition of the suction dredge rule briefing was made and seconded. The motion carries and the agenda has been approved.

Approval of Minutes for April 29, 2004 Council Meetings

Terry McLaughlin asked the Council if there were any corrections, additions, or comments to the April 29, 2004 Council meeting minutes?

A motion was made and seconded to approve the April 29, 2004 Council meeting minutes. The motion carries and the minutes for April 29, 2004 have been approved.

Briefing Items

Update on Water Quality Enforcement Activities

John Arrigo said John Wilson asked for an update on where the Enforcement Division was heading with its budget to ensure that the Enforcement Division was adequately funded to do their job properly. An update of the status of Water Quality Act enforcement and legislation

the Enforcement Division is going to propose that will affect the Water Quality Act will also be presented in this briefing. (Updated handouts were passed out.)

Generally the budget has not changed significantly. Enforcement's funding is from the following sources: a third from general funds, a third from federal grants and a third from fees. Enforcement is not asking for any significant increases. A few years ago there was a change in the pay plan and money was taken out of operating to pay the staff more and to improve recruitment and retention. This session, Enforcement will be asking for an increase of approximately $35,000 to ensure there is enough money to investigate complaints, collect samples and do the job properly. Enforcement is also asking for a leased vehicle for $7,500. The Division has owned a vehicle that was donated and is no longer safe to drive. The final numbers are being prepared this week for submittal to the legislature. The table in the handout shows where Enforcement gets funding and the distribution of money.

In the new handout is an overall summary of Department enforcement activities for the fiscal year 2004. In general, Enforcement responds to all citizens' complaints and processes all the formal enforcement actions. There are about 1,000 complaints each year, last fiscal year there were 908. The complaints fall into four main categories: air, water, waste and miscellaneous. A lot of formal enforcement cases are in the public water supply law and underground storage tank law. Enforcement has been very active in water quality and has had an initiative to take enforcement actions for CAFO permit violations, a number of storm water permit violations, and spills that cause water pollution. Penalties under the Water Quality Act for last fiscal year settled for $270,000 in five cases; the Department has collected almost $150,000. Not all of the penalties have been collected because they are under a payment schedule or the violators have ignored the penalties. Penalties collected from the Water Quality Act go into the state general fund and do not come back directly to the Department.

Ongoing active Water Quality Act cases are listed in the handout. The list includes the case manager for each specific case in the Enforcement Division. The cases under case development are ones where Enforcement is preparing the case, calculating the penalties, and writing the order. Some cases are under order where Enforcement has issued an order or the violator has signed an order on consent and agreed to do something. Some cases are under appeal to the Board of Environmental Review (BER) or are in litigation where they are going to or may go to court. Most of the cases under Vicki Marquis are for failure to pay fees and Enforcement is going to issue an order to require the entity to pay their permit fee and fine them for their failure to pay their fee. Some of these are feed lots and some are storm water type violations.

Barb Butler asked if this was the first time Enforcement Division would be receiving fees from the junk vehicle program?

John Arrigo said yes the double asterisk note on the table indicated that this included additional onetime performance partnership grant of $85,000, which is EPA grant money. The Enforcement Division has typically been short money. For each year of the past four years, there was EPA grant money that was not spent in the region and was given back to the states. Enforcement Division has gotten anywhere from $35,000 to $135,000 each year to fill the shortfall. There is no guarantee the carryover money will be available in the future. This year Enforcement Division went to the Permit Division and asked for additional fee money to fund them more securely instead of relying upon the EPA carryover money. Enforcement is getting

new $80,000 in UST registration, air quality, public drinking water and junk vehicle fees. It is a more reliable source than trying to ask for more general fund or being dependent upon EPA. EPA is not increasing their grant funding.

Barb Butler asked when does the Department find out if they do get money from EPA?

John Arrigo said there is a grant application process the Enforcement Division goes through every year. The Enforcement Division always applies for more money than is available. EPA has been consistent in giving $x-thousand per water quality, $y-thousand for air quality. Although EPA calls it a Performance Partnership Grant, those amounts have stayed consistent. It is dumped into a pot and Enforcement gets to determine how to distribute that money.

Scott Seilstad asked on the case sheet under case development, when it is "under order" what does that mean? What does the "days" mean on the case sheet?

John Arrigo said that "under order" means Enforcement has issued an order that the violator is required to follow or the violator has signed an order on consent and agreed to follow some requirements. The "days" are something the Department has to do for EPA and means how many days have expired since the Director's Office has approved the initiation of the enforcement action to when the Department has issued it out the door. The Department has an agreement with EPA where DEQ is suppose to get the orders out in less than 120 days.

Terry McLaughlin asked if the order referred to an administrative order as opposed to a court order?

John Arrigo said that it may mean a consent created in court or a court order, but 99% are administrative orders. Most of the Departments enforcement is administrative except Irvine Brown. Mr. Brown is an individual in north central Montana that will not install a septic system and has a discharge of raw sewage to a creek. The Department has issued an order and the individual has ignored it so the Department has filed a complaint in court. It is a civil request; they are not under order but the Department is in the process of getting a court order to make him comply.

John Schwarz asked how the Department finds out about cases like Mr. Brown's?

John Arrigo said the Department receives citizen complaints or the county sanitarians will give the Department a call. The Department will investigate and if it is a violation the Department tries to work with the program to get the violator under permit or issue an order to bring the violator into compliance.

Barbra Butler asked if Gerhard Blain has complied?

John Arrigo said Mr. Blain signed a consent decree, which laid out a schedule for installation of a new community drain field. It is a 4 or 5 year schedule that consisted of several phases: phase one was to put in new community drain fields; phase two was to put in lift station, phase three was to replace the collection lines and eliminate a lot of the mobile homes off of their

individual septic systems. Mr. Blain has become ill and detached from reality, but the Department is working with his attorney to ensure that he complies. Mr. Blain has not yet begun construction of the collection system but has done the lift station and the new drain field.

Scott Seilstad asked for the stockyards, Glasgow and Central Montana, what type of concerns are involved with them?

John Arrigo said that those feedlots were issued a general permit three years ago. As part of the permit authorization, it said that the permit holder has one or two years to construct an appropriate wastewater control facility. The general permit requires that a facility contain all runoff and waste from a 25-year, 24-hour storm. These feedlots agreed to the permit, which required them to create this facility by January 2004. This wastewater control facility has to be an engineered structure and cannot be a backhoe trench. These facilities did not meet that permit requirement. The approach the Department is taking, is not to hammer them with a big penalty order, but proposing a schedule indicating that if they agree to submit the engineered plans and specks by a certain date (some are after July), agree to complete construction by a certain date (some are after November), and if they agree to meet the compliance dates, the Department will not assess a fine. These feedlots agreed to this in an administrative order on consent. The Department also adds that if the feedlots failed to meet the agreed deadline, they will pay $250/day penalty for each day they are late.

Scott Seilstad asked if the fees occur once the feedlots agree on the schedule?

John Arrigo said yes the feedlots agree to the schedule but the Department will negotiate the schedule. The Departments response is that these entities have had two years to meet the permit requirements. Some entities claim that they are waiting for NRCS funding and engineering. The Department feels that the entities need to take responsibility for their businesses and pay the money to hire the engineers to do it right. It is going fairly well, six facilities are ongoing, but one facility is ignoring the Department and DEQ may need to issue a penalty order.

Attempts are being made to try to standardize enforcement through legislation. All enforcement for all the laws in the Department is ran through the Enforcement Division, but each law has its own specific requirements for doing things. Legislation has been introduced in the past but has been tabled and has not been successful. This year, the Director recommended that a workgroup be put together to develop bills that would have a better chance of passing. One of the areas Enforcement is inconsistent on is the penalty calculation. For some laws there are rules; under the Water Quality Act a great set of rules describes how to calculate a penalty. Some laws have an EPA policy that the Department follows, some have a Department policy and some have no policy to follow. Depending on which law is involved, the penalties will be calculated differently. The Enforcement Division wants to standardize the process because one staff person is an expert on air and on person is an expert on water, etc. to provide consistency and fairness in calculating penalties. If a staff person leaves it is difficult to maintain the consistency because there is no one else experienced in calculating that type of penalty. One of the main legislative efforts is to standardize the penalty calculation process.

The table in the handout shows penalty factors specified in statutes. Some of the laws like Water Quality, Public Water Supply, Metal Mine and Open Cut Mine, etc., say that when

the Department calculates a penalty it must consider specific factors. The rules are based on these factors. For some of the other rules the factors start to wander or have no required factors. There is no clear definition of these factors in any of the laws. On the table indicating penalty factors in rule or policy, the rule or penalty developed over the years based on the law is all over the table. The legislation will create a new law that says the Department shall use the following factors in calculating penalties under all the laws. The factors will generally follow what is already in existence in the Water Quality Act because it is a good model to go by, is based on EPA's penalty policies and there is a good understanding of what those factors mean. If the legislation is successful, Enforcement will write one set of rules and have one process for calculating penalties for all the laws. Air penalties will be calculated the same as water penalties. There will be a good understanding of what extent and gravity mean to create more fairness, consistency and impartiality in the penalty process. It will improve the dependability of the penalties and streamline the process.

Scott Seilstad asked if it is really a one size fits all process with all the different factors?

John Arrigo said the process is one size fits all but the starting point is dependent upon the penalty authority in the law. Each law has different penalty amounts. Water quality is $10,000 administrative and $25,000 civil, air quality is $10,000 administrative and $10,000 civil and solid waste is $0 administrative and $100 civil. The penalty authority for each specific law is plugged into the process at the beginning and the penalty is adjusted based upon the Departments authority. If an entity has a high gravity component, the Department may increase the penalty by 20%, if the entity has good faith the Department may decrease it by 20%. The method is to start with a maximum penalty authority to calculate a base penalty that will be adjusted up or down depending on the factors. There are bills in the works proposing to add administrative penalties to some laws that do not have them. Enforcement is also going to ask to increase penalties under Opencut Mining Act and Metal Mine Reclamation Act. If the proposed penalty factor bill is successful, Enforcement will be able throw out a bunch of rules, delete some sections of law, and simplify and standardize things. It will make it easier on the regulated community. Some refineries have hazard waste permits, air permits, and wastewater permits. If the Department had to take an enforcement action under each permit the refineries attorneys would have to negotiate on different penalty factors for each law. It will be easier for the regulated community to argue the Departments penalties because they will know it is consistent from one to another.

Terry McLaughlin asked where is the Department at in terms of preparation of the legislation?

John Arrigo said the workgroup has written some rough drafts that have been given to the legal staff to actually draft the bill. A rough first draft of the penalty factor bill has been written. The Department is going to start looking for sponsors for the penalty factor bill. Copies can be made available to the Council when they are submitted to the Legislature.

Terry McLaughlin said that the Council does not need to see the copies of the bills at this time since the Department does not know what the final form will look like when it comes out of

the Legislature. It may need to be something the Council will need to see later when it is in a final form.

John Arrigo said that one significant change is how the Department views history. In the current calculation procedures it says that if you have a history of violation, increase the penalty by a certain amount. The question came up in one case of what constitutes a history. Just because the Department sends out a letter and says the entity has exceeded a limit or did something wrong and are in violation, does not mean it is a violation unless it has been litigated and the evidence and facts have been evaluated. There are circumstances with any incident that may or may not make it a violation or may not make it as severe a violation. In the past if the Department sent out a violation letter out, the Department would count it as a violation and count it toward history and increase the penalty. The new proposed bill will not count it toward history unless it has been included in an order where the Department has issued an order that says this is a violation and provides facts to support it. History has to be established in an order and not just in a letter from the Department, which is consistent with EPA's policy.

Terry McLaughlin asked if the Department was to have the penalties act come out in a form that is substantial for what the Department is designing and hoping for, how do you see that affecting future budgets and the ability to collect on the enforcement actions? This is just how you determine a penalty but will it have a barring on either of those two elements in the Enforcement Division?

John Arrigo said that the proposed bill would not affect either the budget or the ability to collect a penalty. It will make the penalty calculation process more streamlined, but Enforcement will still calculate a penalty. It will be consistent from one law to the next. When the Department does enforcement, there are a variety of steps: review the file, evaluate the evidence, write an order, calculate a penalty, and negotiate a settlement. The Department is not assessing huge penalties to put people out of business. The Department tries to make the penalties commensurate with the severity of the violation. The proposed bill won't save any time or free up resources and will only make what Enforcement does more consistent and fair. As far as being able to collect any more or less penalties, some people will pay and some don't. If the violator ignores the Department's order, a court order must be obtained but the violator may still ignore a court order. The large corporations usually pay the penalties when they have violated a law. Usually the small companies or entities do not do the right thing and pay the penalties.

Barbara Butler asked if in the proposed legislation where the Department has to include administrative penalties in areas that don't have administrative penalties, is the language similar to the legislation the Department had two sessions ago?

John Arrigo said the proposed legislation language is much simpler than before. It just adds a couple sentences. For example, the solid waste civil penalty of $1,000/day is going to be bumped up to $5,000/day and a $500 administrative penalty is going to be added; this only changes a couple of sentences. The legislation also adds the consistent penalty factors because there is no language in the Solid Waste Act, Junk Vehicle or Subdivision, which provides guidance on calculating penalties. This is a separate stand-alone bill so if the penalties get

approved, the Department will also put in the penalty factors. If the all-encompassing penalty factors bill passes, it will have to be coordinated with the bill that adds the penalties. Other than air, hazard waste and water rules, Enforcement is trying to get civil penalties of $5,000 and administrative penalties of $500. Administrative penalties are small penalties for small violations and small violators but can add up, so $500/day is a reasonable amount. The Department wants a larger penalty if they have to go to court, so $5,000 is appropriate. For example, some of the junk vehicle violations have been in violation for two years, so $50/day adds up after two years.

Overview of Arsenic Fact Sheet

Terry McLaughlin said that at past meetings there were lengthy discussions on the arsenic issue. From reviewing the minutes of the April meeting it looks like the Council has what it needs. A fact sheet was requested incase it was needed as this issue moves forward.

Jon Dilliard said there was an error in the fact sheet that went out. In the middle of the third paragraph of the fact sheet it says EPA published the proposed rule for arsenic on June 22, 2000; it should say June 22, 2001. (Revised copies of the fact sheet were handed out.) The purpose of the fact sheet is to step the Council through the history and what brought the Department to the current drinking water standard for arsenic. In the background section, it shows through the history of the arsenic standard that it started in 1942, broadened into drinking water standards in 1975 and in 1996 the update of the standard began. Three years ago the standard was changed for drinking water systems. The next section on the new MCL explains the Departments adoption process. The effective dates section is trying to clarify and explain the effective date since it was something that was discussed at the last Council meeting. The federal regulations adopt a rule and the rule has an effective date for the standard that was adopted. When EPA adopted the new arsenic standard in 2001, the effective date when public water systems must comply with that new standard is five years in the future: January 23, 2006. During that period the public water systems are expected to sample, monitor their arsenic level, and prepare and start the process of what they are going to have to do to comply. In essence, the rule is saying that by January 2006 the public water systems better be in compliance and not say then that they are out of compliance and start the process to get into compliance. January 2006 is the day that the system is expected to produce water that is within the standards. Currently the Department is in the process of actually doing some rule adoptions that incorporate some of the standards. EPA was not satisfied with the way the Department listed some of the reporting requirements in the standards and felt that what DEQ had included in their rule did not require the systems to report to a small enough degree. DEQ disagrees with EPA but will go ahead and adopt by reference EPA's standards instead of opposing EPA.

Scott Seilstad asked how many communities have a problem right now with the new arsenic standards?

Jon Dilliard said there are about 45 communities that have identified they have an arsenic problem.

Scott Seilstaid asked if the problem with arsenic is from naturally occurring arsenic?

Jon Dilliard said that most all cases are from naturally occurring arsenic. One community, Three Forks, does have a problem with the new arsenic standards but has obtained an EPA grant to put in a test plant to treat arsenic. EPA, through the grant process, is going to build the community a system to treat the water to remove arsenic. EPA will use this as a test case to monitor and collect data to see how the process works and then turn it over the city.

John Schwarz asked how much the EPA plans cost? How many millions of gallons is it treating?

Eugene Pizzini said the grant is for a million dollars. The Department is unsure as to how many gallons are to be treated.

Terry McLaughlin asked of the 45 communities that have identified they have a problem meeting the new standard, how many of those are surface water sources vs. ground water sources?

Eugene Pizzini said that it appears that most of the surface water facilities will met the standard. The ground water systems have the problem with arsenic.

Terry McLaughlin asked for the systems that have to do something to come into compliance, is there some mechanism in place in the state or EPA to provide assistance?

Jon Dilliard said the assistance that is in place from the state level is the State Revolving Fund (SRF) low interest loan program. They can apply for and use the money to get started on improvements. The SRF program does provide for upfront engineering of those systems and will help fund it. There is also the Treasure State Endowment program, which has funding through the Department of Commerce.

Barbra Butler asked if there was any money in rural water from Fish, Wildlife and Parks?

Jon Dilliard said he was not aware of any money from Fish, Wildlife and Parks. The standard state funding mechanisms that are out there for public utilities are applicable to the arsenic improvements. Unfortunately there is no identified pot of money specifically held for arsenic standard compliance except for the grant from EPA issued to several facilities to put in test plants.

Scott Seilstad asked what type of treatment plant does it take to remove arsenic?

Jon Dilliard said it is generally an ion exchange system. The Three Forks treatment plant is currently using iron. It is a system where the water is put through a material that attracts the arsenic ions and holds on to them. The clean water coming out has been reduced of arsenic and then they recycle the medium, which is replaced over time to continue the process.

Scott Seilstad asked for small systems, what would be the cost if they do not get any help?

Eugene Pizzini said one of the things EPA did was to really start to move forward with point of use and point of entry devices for small systems. It is believed that it will be a break-even issue between central treatment and individual treatment at home as there are approximately 200 service connections. EPA is trying to move forward to push point of use and point of entry for small systems. One issue about the funding mentioned earlier, is that it is funding generally for municipal systems as opposed to private, like a homeowners association or a privately owned trailer court. Private parties do not have access to this money.

There may be a silver bullet coming out; a collage professor in doing work for something else determined the specific compound that removes all forms of arsenic from water very rapidly and simply. This method is working and AWWA just sent out a fact sheet on it and are working through the patent process. Once it has been patented it sounds like it will be a cartridge screwed to the end of a faucet and removes arsenic and arsenate. From a cost point of view it may be substantial to public water supplies.

John Schwarz asked if the sampling location would be at the source?

Jon Dilliard said the sampling location is generally outward from the distribution system.

Eugene Pizzini said with arsenic it is an entry point sampling location. With a point of use and a point of entry devices would be required to sample after the treatment device to ensure they are working.

Scott Seilstad asked if reverse osmosis or something similar would work or does it have to be an ion exchange?

Eugene Pizzini said the three treatments generally accepted are reverse osmosis, ion exchange, and specific filter media, which the new one would be under. Some are more effective at removing one form of arsenic than the other form.

Scott Seilstad asked if something that removes arsenic would also remove nitrate?

Jon Dilliard said that a system that removes arsenic would not necessarily remove nitrate.

John Schwarz asked if the Department had any problems with the 2006 deadline?

Jon Dilliard said the Department does not have any problems with the 2006 deadline. It has already been adopted into the public water regulations and will become effective on January 23, 2006.

Municipal Separate Storm Sewer System (MS4) General Permit

Bonnie Lovelace said that over the past several years, the Department has given many briefings to the Council on phase 2 storm water requirements. At this point all the rules are finished, everything is in place and this is the final piece, which the Council should have received as a separate mailing. This is the phase 2 completion process. In the packet is the statement of basis, the fact sheet for the permit, and the permit. This permit applies to government entities, which are municipal storm water facilities. This permit is different from the

typical MPDES permit that entities may get because this is a pollution prevention permit. This is a management permit about storm water in the community and is limited at this point by the rule to particular communities that need to have it. Essentially this is for those communities with a population of 10,000 or more, contains the six minimum criteria that have to be met per the rule and is a limited utility to those entities. The permit requirements would give these entities the first 5-year permit term to come into full compliance with the storm water requirements. The Departments intention and commitment is to get all required entities under permit by March 2005. This is currently out for public comment. The Department will have the permit issued and all the processes finished for all the communities by the end of March 2005. All the communities have had time to know what the requirements were. The Department received original applications from everyone who needed them a year ago and now the details have to be dealt with. This permit tells the entities what the details are and indicated they have to match the rules entirely. The Department is required to provide information on all general permits to the Council, which is usually done in a separate mailing.

Barbra Butler asked when the 5-years officially starts?

Bonnie Lovelace said that when the Department issues a permit, it will be signed and then there is a 30-day period before it becomes effective. The start of the 5-years period is on the day the permit becomes effective. This permit would have to be renewed every 5 years and those who hold it would have to apply just like any other general permit. The Department will issue authorizations under the general permit to those who are required to get coverage and they would be in the 5-year cycle associated with the permit. The authorization would be good until the general permit expired. Entities would be expected to reapply and the clock would start at that point.

Barbra Butler asked if the Department thought the clock would start before the end of the year?

Bonnie Lovelace said yes, the 5-year clock would start when the Department gets the permit issued.

Scott Seilstad asked if this is under a general permit?

Bonnie Lovelace said yes this is a general permit. This general permit process is used nationally. The Department is going to continue as a program to try to use general permits. There has been talk about how there are interests in Montana that do not want to use general permits. The regulations and laws allow the use of general permits and the Department is going to try to continue to use them. The only place right now under the court order where the Department cannot use a general permit is the animal feeding operations. The Department will deal with the consequences of what happens if someone chooses to challenge any general permit the Department puts out.

Terry McLaughlin asked if EPA also supported general permits.

Bonnie Lovelace said that EPA does support general permits. In Montana, the Department does more than EPA does with general permits. The reason for this is that EPA in other states uses a notice of intent process for their general permit almost exclusively. This is where the general permit is written and the notice of intent to be covered under that permit is received and very little review occurs. In Montana, the Department does review and tell people if there are problems, with the exception of constructions storm water requiring a notice of intent through the law, and the Department issues an authorization. The Department issues an authorization letter for storm water but they are allowed to move forward with their project once they submit their application and the fee is paid. That is not true for other general permit applications. When someone requests coverage under a general permit they must wait to be authorized. The Department does go a step further than EPA in Montana.

John Schwarz asked how is the Department handling the reporting on the sampling requirements? Is it for each stream the entity would be discharging into?

Bonnie Lovelace said there is a page on monitoring in the fact sheet and the permit. It is not really in-stream monitoring but effluent monitoring from the pond. It is representative of the discharge and is not absolute of what is occurring. The language for that monitoring is summarized on page 9 of the fact sheet. If something is found the entities will have to do additional work to determine why that pollutant is there. This is something the permit will require these entities to do. The permit requires permit holders to find the illicit dischargers that may have a pipe coming into their storm water ditch that is not supposed to be there.

Terry McLaughlin asked if there was any guidance in terms of when the permit holder needs to monitor within the semi-annual period? Does it have to fall within a specified time following a precipitation event? How are they directed as to when to conduct the monitoring?

Bonnie Lovelace said that there has to be effluent discharge to monitor. Storm water runs when it runs so the permit holder would have to catch a sample when it happens. A permit holder can't sample something that is not there. It is discussed in the permit how to sample. The Department recognizes that the entity has to catch it when it happens. Hopefully the permit holders will say that it is raining and get out to sample.

Terry McLaughlin said the title indicates it is for "small" municipal systems. Is there a cut off point or does it apply universally?

Bonnie Lovelace said the classification of "small" is based on the federal regulations and how they were adopted. In the early part of the storm water program, the larger MS4 communities had to have permits much earlier. Montana did not have any big communities that were required to permit in the early 1990's. The cut off there was on the order of 100,000 people. Montana did not get hit with the storm water requirements at all until the newer set of rules came into effect. Montana now has the smaller communities. The states that had larger MS4's also had to add the smaller ones. There was a phased approach to get the big dischargers first and then go to the smaller communities.

John Schwarz asked if there was a cut off if the community was below 20,000 or 50,000?

Tom Reid said that if the community is over 50, 000 it is automatically in the smaller MS4 class. If the community is above 10, 000, phase 2 regulations are evaluated and the Department designates the community as a MS4 based on certain criteria like housing density per mile^2. When the Board adopted the rules, seven municipalities in the state of Montana were defined as small MS4's.

John Schwarz asked if the community is smaller than 10, 000, does it need a storm water permit?

Bonnie Lovelace said that communities smaller than 10, 000 do not need storm water permits. The Department did not designate by rule that these communities needed them. It is possible in the rule that the Department would find a community smaller than 10,000 in the future to be a significant contributor of pollution. The Department would work with the community to get them permitted. The Department does not know of any small communities (under 10,000) that would be classified as high polluters. If population changes occur, the communities are not automatically covered under the permit as the permit listed specific communities that were required to be permitted. The Department has the ability based on pollution to go anytime and see if they should be permitted.

Terry McLaughlin asked if it was true that there were no communities subject to the large MS4 regulations?

Barbra Butler said no communities were subject to the large MS4 regulations but there are industries subject to large MS4 regulations. The Billings airport has a phase one permit.

<u>Suction Dredge Rule</u>

Bob Bukantis said this is to let the Council know what is coming. The last legislature passed a piece of legislation where the intent was three fold: 1) To require the state to put clear information on the website for people who are interested in recreational suction dredging in terms of where they can and cannot suction dredge for gold and if there are seasonal restrictions; 2) To reduce the fees from the standard approach the state has of trying to recoup costs, to a level that is more acceptable to recreational suction dredgers with the thought of drawing more people in for suction dredging; 3) Directing the Department in developing the suction dredging rule to work closely with Conservation Districts. The Department has had discussions on how to best to meet the legislative requirements. DEQ has initiated discussions with Fish, Wildlife and Parks (FWP) since the main issue in terms of when and where recreational suction dredging can be done has to do with conflicts with fisheries and maintenance of populations of fishes. The Department is working on how to develope the information from a technical perspective with FWP in terms of what streams are or are not appropriate to be suction dredged and what may be the appropriate seasonal restrictions. The Department would put a short piece regarding the restrictions into the water quality standards portion of the rules with reference to a circular that would detail when and where dredging would be allowed. The sequence of events once the Department has worked everything out would be a review within FWP and DEQ, review the proposed rule with the Conservation Districts, do a stakeholder review, bring the rule to this Council and then to BER.

Action Items

Concentrated Animal Feeding Operations (CAFO) Proposed Rule Change

Tom Reid said this process started in 1995 with the president's Clean Water Action Plan and some work between EPA and the Department of Agriculture that resulted in a national stakeholders group. The process went on throughout the 1990's. In January 12, 2001, EPA proposed a federal rule to revise the existing CAFO effluent guidelines and rules. On February 12, 2003, EPA adopted a final CAFO rule. DEQ and EPA had a stakeholder meeting in Montana on March 5, 2003 for EPA to explain the process. EPA explained what the rule laid out, how it was going to affect CAFO users, and how the rule gave the delegated states one year to adopt the regulations. Montana has been a delegated state for NPS since 1974 and is required to adopt the rules within one year of EPA's final promulgation. The Department did not make the deadline but is now in the process now. EPA is working with the Department on the deadline.

What the Council received in the packet, a copy of the proposed rule and a copy of the proposed circular DEQ 9, was mailed out to approximately 240 businesses in July including all CAFO permit holders, general interested parties mailing list, and anyone who attended the March meeting and expressed an interest in being on that mailing list. The Department announced at that time that a stakeholder meeting would be held in Helena on August 12th for anyone who was interested in providing comments. The Department requested that written comments be received by August 15th. The Department has received 5-6 comments, some of which are extensive. Comments are also being solicited from the Council. A revised circular will be produced in response to any comments and will be mailed out by September 3rd. The Department will request the Board to initiate rule making. The Board will appoint a hearing examiner, have a hearing, and skip a meeting so if the Board initiates the rule in October they would not be taking action on the rule until January.

The Department has been incorporating the changes suggested by stakeholders into the circular. It was requested of the Department to have another meeting in eastern Montana. The Department may have another meeting when the revised circular is submitted to the Board. There have not been many changes to the rule other than some technical edits from the attorneys. There are three components to the rule: 1) the actual CAFO rule, including the amendments to the Administrative Rules of Montana (ARM) for the Montana Pollution Discharge Elimination System Rules (MPDES); 2) subchapter N of 40-CFR that is adopted by reference in the CAFO rules, which are federal effluent limit guidelines; 3) technical standards that are in DEQ Circular 9.

Terry McLaughlin asked if Circular 9 was a new circular?

Tom Reid said that Circular 9 was completely new.

Moriah Peck said in 1972 congress specifically named CAFOs as point source subject to the National Pollutant Discharge Elimination System (NPDES) permitting program. Montana was delegated and has the authority to regulate CAFOs. EPA established effluent limitation guidelines for CAFOs in 1974 and 1976. What those effluent limitation guidelines said is that CAFOs have to control any runoff from their site and any process-generated wastewater and contain it up to a 25-year/24-hour storm event. In 1999 EPA and USDA issued a Unified

National Strategy for animal feeding operations (AFO). This strategy said that containment was not enough and AFOs had to deal with how manure was disposed of. The strategy included land application requirements, such as nutrient management plans, to control how much nutrients were being put on the soils to make sure it is not being allowed into surface waters. In 2003 under a court order, EPA did update the CAFO rules to include new effluent limitations guidelines and requirements including nutrient management plans.

Major 2003 federal rule amendments said that all CAFOs must apply for a permit. Under the old 1976 rules a permit exception said if you did not discharge except during a 25-year/24-hour storm event, you did not need a permit. EPA has taken this permit exemption away largely because a lot of facilities avoided permits that probably should have had permits and as such, EPA has not been able to effectively regulate that community. In place of the old exception a no potential discharge determination exception has been added to the rule. It is taking the determination from the producer saying they are not discharging to the Department saying they will look at a situation and if there is no potential of discharge they will grant the request and the producer will no longer need a permit. The rule amendments also included other animal sectors, including dry poultry operations, and took out the mixed animal unit determination. Effluent limitation guidelines for most animal sectors stayed the same, which included containing all runoff and process wastewater up to the 25-year/24-hour storm event. EPA did establish a more stringent effluent limitation guidelines for new, large swine, poultry and veal calf operations, which have to contain up to a 100-year/24-hour storm event. This is based on economic analysis that EPA did. The new amendments included land applications requirements where all CAFOs now have to develop and implement a nutrient management plan looking at applying waste at agronomic rates. The new rules also include alternative performance standards. EPA indicated that there might be a situation where a CAFO is able to collect the waste and treat it to a certain level that would be okay to discharge. In lieu of containing waste, a CAFO may treat the wastewater and discharge it; the federal rules give specific requirements for that to happen. The amendment also included additional measures and records for certain animal sectors. An annual report is required to be submitted to the Department describing the operation and if there were any discharges.

Bill Griffin asked if the no potential for discharge determination could be awarded to a large CAFO? This would be a 100,000 head or above where it automatically classified as large CAFO.

Moriah Peck said that a large CAFO can apply for the exemption, but it says there must be no potential for discharge under any climatic conditions. It is not just looking at the 25-year/24-hour storm event. The guidance EPA has issued says that anyone with open lots probably does not qualify for the exemption. In addition, for anyone who land applies, that in itself even if it were done in accordance with a nutrient management plan, would not qualify for the exemption.

John Schwarz asked if that is a discharge to surface water?

Moriah Peck said that it is a discharge to any state water. To be a CAFO means it has to be an animal feeding operation (AFO). An AFO is defined as a lot or facility where the following conditions are met: animals have been, are or will be stabled or confined and fed or

maintained for a total of 45 days or more in any 12-month period; and no crops, vegetation, forage growth or post-harvest residues are sustained. What brings in livestock auctions and dairies is that they are not being fed but are being confined in the same area where they are generating waste. The next part of the definition for an AFO to be a CAFO is when they meet the regulatory definition of a large CAFO, which is based on animal thresholds, or meet the definition of a medium CAFO, which is based on animal threshold plus some additional discharge criteria. The Department may also designate a facility as a CAFO on a case-by-case basis. The thresholds for a large CAFO are the same thresholds in the 1976 regulations except that they have added a few animal sectors. For medium CAFO thresholds, if you meet the thresholds the operation is still an AFO unless they meet additional discharge criteria. A medium AFO would have to be discharging before it would be considered a CAFO. The federal regulations say the following criteria must be met: pollutants are discharged through man-made devices, a ditch or a pipe, to state waters or if state waters are running through the confinement area, then a permit would be required. Under the definition of state waters it includes groundwater, so there are some situations on a case-by-case basis that may need a permit if there is shallow groundwater that is being discharged to.

Federal regulations include an implementation schedule on who needs to apply when. For CAFOs already permitted, they need to reapply for their permit within 180 days of it expiring. For large CAFO with the 25-year/24-hour permit exemption under the old rule, they have until 2006 to apply unless DEQ finds problems and requires a permit earlier. All CAFOs are required to keep records under the new federal regulations that includes a copy of the nutrient management plan, any documentation on the implementation of the nutrient management plan, soil samples, manure samples, etc. Large CAFOs are required to keep records if they transfer manure to another entity so that they are not land applying and give it away or selling it as compost. They need to keep records of who they gave it to, when and how much. Large cattle, dairy cow, swine, poultry and veal calf CAFOs are required to keep additional records, which include: inspection records; weekly visual inspections of storm water diversion devices; any run off being directed to the waste containment structure needs to be checked to make sure there is no sediment build up or debris blocking it that will cause run off to circumvent the waste control system; daily inspections of the water lines to look for and fix leaks because a leaky water line is reducing the volume capacity of the waste control structure, which causes it to overflow and discharge in violation of the permit; mortality management; overflows; current design of waste control system that includes volume of solids accumulation; design treatment volume; total design volume; total days for storage; and total land application records. These items were not required in the past but the effluent limits says that a CAFO must properly design, construct, operate and maintain a facility to control the run off.

Bill Griffin asked if all these required records come directly from EPA guidance with nothing added?

Moriah Peck said yes they are directly from EPA without anything added by DEQ. Land application records are from the federal requirements and would be included in the nutrient management plan. Records required for land applications include: expected crop yields, when the entity is applying to the fields, the weather conditions the day before, the day of and the day after applying the waste, the test methods used, the results, show how agronomic rates were determined, how much nitrogen and phosphorus was actually applied to the fields, the methods

used to apply the manure (i.e. incorporating or broad casting), and the dates of when the manure application equipment was inspected.

Depending on the animal sector and if it is a large or medium CAFO, different requirements are used. Any CAFO, regardless of size or animal sector, is required to have a nutrient management plan and do an annual report. Large dairy cow, cattle, swine, poultry and veal calf CAFOs, under the federal regulations, have to develop a nutrient management plan in accordance with state technical standards. The federal guidelines leave it up to the states to develop the technical standards, which is in DEQ circular 9. In the proposed rule change, the Department is adopting the revised federal regulations, established state technical standards on nutrient management and established design criteria for waste control facilities. State technical standards for nutrient management include best management practices (BMPs) for land applications of waste; some of which are already established in federal rules, e.g. 100-foot setback from any surface waters or have a 35-foot vegetative setback. The technical standards include two methods for doing field specific assessments to determine if it should be done on a phosphorus based application or a nitrogen based application: a phosphorus index NRCS developed or a soil test. DEQ tried to include some flexibility for producers; the two methods do not always come up with the same results. If a producer finds problems with one, the other method may allow the producer to apply nitrogen-based application vs. phosphorus application. The technical standards include two different ways for determining agronomic rates: a NRCS method, which is a somewhat complicated procedure; and an easier method developed by DEQ. The technical standards also include flexibilities for multi-year phosphorus applications. The BMPs are applicable to all CAFOs and address the form, source, amount, timing and method of application, and the application of waste to frozen or snow-covered ground. Some states have said that CAFOs cannot apply waste during the wintertime but Montana has not gone that route and allows application on lands with little runoff potential.

Design criteria in the federal guidelines specifies that the volume of waste control structure must reflect the following items: storage period, DEQ has established a minimum of 180 days based on cost analyses EPA did; all the waste accumulated during the storage period; normal precipitation and evaporation; normal run off; direct precipitation from 25-year (or 100-year)/24-hour rainfall event; residual solids after liquids are removed; necessary freeboard; and if treated, the organic loading. The design criteria in the circular are based on normal industry standards and include NRCS's standards and neighboring states requirements. Most of the comments received from the stakeholders have been revisions to the design criteria. One thing DEQ did include on the design criteria is a case-by-case deviation to realize that those particular factors or criteria may not be applicable to a specific site. The circular summarizes the federal effluent guidelines and the 25-year/24-hour containment for all animal sectors except for ducks. Ducks can actually have BOD or fecal limits that were incorporated into part 412 of the CFR. The circular established design criteria to give guidance to producers on what the Department considers properly designed systems. The Department also provided for informational purposes descriptions of ways to calculate waste production, ways to collect representative samples and calibrate equipment. These are not requirements and are there for information since producers often ask this. Circular DEQ 9 summarizes the nutrient management plan requirements outlined in the federal requirements. It establishes BMPs and the state's technical standards.

John Schwarz asked if there was an incorporation requirement in land application?

Moriah Peck said no there was no requirements for land application but it will have a limit addressed in the nutrient management plan.

Terry McLaughlin asked if the 45-day number for how long an animal is at a feeding operation is a continuous period or an accumulative over a 12-month period? Is this 12-month period a calendar year basis? When does the clock start counting for the 12-month period for an operation? Is it when a load of animals is delivered? If the animals are moved off sight three weeks after arriving and then returned, does the first three-week count toward the 45-days?

Moriah Peck said that is not a continuous period and could be any 45-days out of a 12-month period. It is not necessarily a calendar year. The 12-month period starts when the load of animals is delivered to the operation. If animals on the lot are moved after three weeks and then returned, the first three weeks do count towards the 45 days.

Scott Seilstad said that under the 45-day requirement, almost anything is classified as a CAFO; a horse stabled or a calving operation in which the cattle are brought in to calve will be there 45 to 60 days. Very little agriculture livestock operations would not come under the 45-day requirement.

Moriah Peck said the animal feeding operation definition has not changed since the 1976 regulations.

John Schwarz said that CAFOs would still have to meet the minimum number of animal heads.

Moriah Peck said that yes the animal threshold numbers must be met to be classified as a CAFO. Just because a producer meets the AFO definition does not mean that a permit is required. CAFOs require a permit. There are a lot of facilitates like livestock auctions and winter calving operations that do need permits under these rules and have since 1976.

Bill Griffin said that an operation could be a small number (50 head) and be a polluter of surface waters that could be out of compliance. Just because it is small, it could still be a CAFO.

Moriah Peck said that for small feeding operations, it has to be designated by the Department through an on site inspection before it would be classified as a CAFO and require a permit.

Bonnie Lovelace said one of the things the Department did was provide a system of off ramps for small operations being in a situation of polluting and needing a permit. DEQ developed a working scenario with NRCS where NRCS would go after the small operations and offer assistance and get them in a condition where these small operations were not significant polluters. NRCS also added additional points to their scoring for projects to receive money if they have received a violation and there is a problem. This gives the opportunity for all small operators to have an off ramp to clean up and not need a permit. DEQ likes to think that those small operations are off their radar and there is a mechanism out there to assist those operations and keep them off the radar.

Bill Griffin agreed with and appreciated the opportunity and thinks that is the way to go. AFOs that are close to the thresholds for being a large CAFO have an interest to not be classified as a CAFO by doing certain things.

Terry McLaughlin asked if there was an outreach program that has been considered once this has been implemented, for those operations in the state that have no familiarity with permitting requirements? Is there going to be an outreach program to go to the different counties and explain this rule?

Moriah Peck said it is the Departments intention is to go out and explain this rule. The Department has been doing a lot of outreach now to explain the federal regulations and will continue to do so. The Department has also been working with MSU to put together a brief document that explains these regulations and who is affected.

Bob Willems asked if livestock sales yards be subject to these rules?

Moriah Peck said that livestock sales yards are subject to these rules.

Terry McLaughlin asked how many CAFOs are currently in the state of Montana?

Moriah Peck said the Department has not done an inventory but currently has 85 permitted CAFOs. Some are going to drop off. There is a mixed animal determination in the 1976 regulations. For example, if there were dairy cows, poultry and swine at one operation, an animal unit determination would add all the different types of animals together and if it totaled over a 1000 animal units then a permit was required. The new regulation has completely dropped the mixed animal determination because EPA decided that it was too confusing. A lot of the colonies will probably drop off from having to have a permit, but it is on a case-by-case basis.

Terry McLaughlin said that those colonies might not have enough of a particular type of animal to be considered for a CAFO even though collectively they have the potential for more impact than someone else who is required to have a permit.

Moriah Peck said that's correct and that is a situation EPA has anticipated by allowing the Department to designate an operator as a CAFO if necessary.

Terry McLaughlin said that as far as the Council is concerned, the Council is being asked by the Department to recommend this rulemaking as proposed to be brought to BER for them to go ahead and initiate rulemaking. If there is no specific comments or request for the Department, the Council would look for a motion to direct the Department to go ahead and bring these as proposed to BER. For those who have a concern, including the public, please come forward with comments. There is a sense of urgency because the state of Montana has not completed its process within the one-year time frame allowed by federal regulations. If the state does not act upon this, EPA will and once they do, they do not have the same perspective that DEQ does for

how things are enforced. EPA is not as easy to get along with once they are the ones in control of the program.

Scott Seilstad said that he was concerned if there was enough input and time allowed. The August 12 meeting was timed badly for livestock people who could not attend due to other commitments. There is some concern that this is being rushed. There are some real concerns about the nutrient management part of the rules. There have been comments from different stakeholders on this.

Moriah Peck said the Department has received several written comments. The Department has been working during the past two weeks making changes where possible. The nutrient management sections have not had a lot of comments yet. During the stakeholder meeting, there was some discussion regarding phosphorus-based application and how some producers did not have enough land to dispose of it. Alternative methods for disposing the waste were discussed. It is in the federal regulations that the state does have to address phosphorus.

Tom Reid said that what a lot of the states are doing is to incorporate by reference the NRCS technical standards that are on the NRCS website. NRCS does not publish the standards and only puts them on the web site. DEQ's attorneys said the technical standards could not be adopted by reference because DEQ's process does not allow us to adopt a website because NRCS may change it at any time. DEQ printed out the NRCS technical standards and put it into the circular, which makes up about 90% of the circular. Montana is following the pattern of what most of the other states have done by relying on NRCS to be the expert on a lot of the issues, including phosphorus and nutrient management plans. This also satisfies the request received over the years on how to build a waste management facility. DEQ has never had any standards in the past and have said the producer can design a plan, submit it and DEQ would look at it to see if it is appropriate. This new circular gives the Department's expectations on developing waste management plans and containment structure. It does have a deviation process for those areas that the guidance does not fit.

Scott Seilstad said that Montana is so diverse in soil types and precipitation that there has to be a lot of flexibility in the rules. A 15% slope in one place would not be a problem somewhere else. There are so many different factors that to try to put everyone under the same rule is difficult. Depending on precipitation, for some places the problem is dust and not liquid.

Bill Griffin asked if the Department is saying in the DEQ 9, that the Department went beyond the federal standards in some cases? For example, on a well, it may say it has to be 100 feet away in the federal standards and DEQ 9 says 500 feet away. There have been complaints that the Department went beyond the federal mandate in some cases in the DEQ 9.

Moriah Peck said the federal rules says the facilities have to be properly designed. By establishing the design criteria, DEQ has not gone beyond federal requirements. There has been a lot of discussion regarding the 500-foot set back. The 500-foot set back is something directly from the Montana Water Quality Act and is already in statute. It is not something DEQ created for these rules.

Tom Reid said the Department has been as much a part of the discussions on the 500-foot set back as any one else. In §75-5-605 in the statute, it says the siting and construction of a sewage lagoon less than 500 feet from an existing well is prohibited. The definition of a sewage lagoon includes animal waste. If this did not exist in statute the Department would have gone with the 100 feet.

Scott Seilstad asked if there was a way to modify it since it is in statute?

Tom Reid said the Department has asked the attorneys and it is in legal review right now.

Moriah Peck said as far as the other design criteria, the Department looked at NRCS, some of the wastewater circulars the Department already had, neighboring states and anticipates situations where they don't fit. It is not limiting but is giving producers an idea of where the best place to locate it is, how they need to design it and what DEQ is looking at.

Bill Griffin asked if the Department is saying DEQ 9 has a good amount of flexibility as far as these are more guidelines than absolute laws?

Moriah Peck said yes, these are just guidelines not laws.

Scott Seilstad said there is some concern that this may be a deterrent to producers having small feeding operations. They want the environmental part but the economic part for Montana may scare the producers into thinking that there are so many hoops to jump through that they do not even want to go down the road of trying to implement a feeding operation. It may lose a lot of economy for the state.

Tom Reid said the Department is trying to regulate the small operations under the permit program by taking extra effort to work with the enforcement program. If the Department gets a complaint, Enforcement resolves the claim, takes care of the issues and works with NRCS with the intention the people will take care of the problem so the smaller ones do not have to get a permit. If the AFO falls in the medium or large category, there are standards to follow. A medium AFO may opt out of a permit by design and construction of a facility in such a manner that does not discharge to state waters.

Stott Seilstad said one of the different agriculture groups is trying to educate producers on what they need to do. If you add more regulations, you have to go back and say this is what it was last year; now it is changed and you have to do these additional things. This goes back to the economic impact of having too many regulations. Could some things be stated more simply without having two pages of regulations?

Tom Reid said the Department is open to suggestions. The majority of the comments that have been received were along the lines of clarifying things, especially with the circular. The Department has not yet incorporated all the changes and would welcome any additional comments.

John Schwarz said according to this, the Department needs to be telling MSU to send the students to get engineering degrees because of the level of detail the producers have to proceed towards. It sounds like there is a process and EPA has a deadline, but for the regulations to be effective it would be better to ensure adequate time for involvement with the stakeholders. With what DEQ has presented to the Council it should wait a little bit rather than request this Council to advise DEQ to go to the Board and start the rulemaking process. DEQ has changed the rules over the last two weeks and had a stakeholder meeting two weeks ago. It should wait a couple of months to be more effective and achieve the water quality goals better in the end.

Terry McLaughlin asked if there was any outreach program in terms of meetings elsewhere in the state other than in Helena to try to explain what is being proposed?

Tom Reid said that the Department has been meeting with groups around the state annually. No there have not been any stakeholder group meetings outside of Helena.

Terry McLaughlin asked if there were any meetings specifically for what is being proposed to go to BER? Have there been any meetings taken to different areas of the state to give people an opportunity to see what is in the rules? The power point presentation is a good primer and contains enough information to give people a sense of the rule without having to really understand all the details. It is one thing to have a stakeholder meeting in Helena and hope that good people come, but is another thing to go the other direction and provide multiple opportunities for that feedback. The Department has received 5 or 6 written comments. For something that is all-inclusive statewide with such a potential for repercussions to the agriculture industry, it is surprising that there have only been so few comments. The lack of comments may be because there has not been enough time for people to understand what these are. The Department is not going to get everybody to understand them thoroughly but the Department does need to get enough people to understand them sufficiently to be able to realize that these have to be implemented and is not a wish list. The Department may be ahead of the curve here and the agricultural people are not up to speed sufficiently.

Peggy Trenk asked since EPA said the Department is behind, does the Department sense pressure from EPA to get this moved forward more quickly or is there some time to delay a little bit?

Bonnie Lovelace said yes EPA is not happy with the Department on this. A lot of the reason it took so long to get to this point was because of EPA. The rule was ready and EPA promised assistance on the technical standards butt dragged their feet so it delayed the process. The Department just agreed on a certain time frame to get this done in the annual process and EPA definitely wants the Department to move ahead with this. The Department does not have a problem before the hearing to get out there and doing further education efforts. A huge percent of the rule is federal requirements and existing NRCS information that is already out there. The federal rules were adopted in 2003 and have been out there. During earlier stakeholder meetings the Department said that this is how it will have to be. The very specifics of this were also out there as the NRCS requirements. The Department allowed a further off ramp with the deviation process. The Department will look at whatever design a producer develops for their site. A certain part of an industry that really knows what they are doing and how the engineering should

go, but then there are a lot that are trying to do it themselves. The Department has to write the guidance for those who are doing it themselves. The Department has given the off ramp, given the ability to deviate, but has captured the minimum federal standards and has not gone beyond that except for some specifics in Montana law.

Bill Griffin asked how does Montana compare to other states as far as going down this road, is Montana ahead of other states?

Bonnie Lovelace said that Montana is not ahead on timing. The Department is very consistent with what the other states are doing.

Moriah Peck said that there are a number of states surrounding Montana that have already adopted the rules and established technical standards and have design criteria that requires submittal by professional engineers offices. Montana is on par with what the other states are doing.

Tom Reid said Montana is close behind the other states. Wyoming is in the final adoption process and the other states have adopted them.

Peggy Trenk said EPA always threatens but for a full understanding, if the Department does not move forward, would the agriculture community be exposed legally or risking some vulnerability by not moving forward? If the questions were not yet answered then it would be best to wait.

Bob Bukantis said that once the Department moves the rule to the Board of Environmental Review, it moves into a whole public review process at that point. The next step if the Department went to the Board, is the Board would agree or not agree to move forward with rulemaking. As soon as the Board agrees to move forward with rulemaking, it would go into a formal public review process with public hearings.

Terry McLaughlin asked if the Board has had any kind of briefing on this issue to date? Is the Board familiar with this as a decision making issue with such an expedited time frame?

Bonnie Lovelace said that the Board has asked for lists of rules the Department is working on and have been provided them on a regular basis. This rulemaking has been on that summary. When the Board asks what is coming the Department tells them and they are provided a written summary they maintain. As far as the details of what is in the rules, the Board does not necessarily know. The Board does know that AFOs are permitted as far as the details of the rule; they have not received them because the Department was not ready to bring it to them.

Tom Reid said there is a deadline of February 2006 in the rules for facilities that are not now permitted. There may be facilities out there now that are not now permitted and they have a duty to apply. It is hard to determine what the status on these facilities would be if the Department was still in rulemaking or EPA saw that the Department was not going to make that deadline; they may decide to promulgate the rules for Montana. There is a liability for the regulated community at that point in time.

Scott Seilstad said the meeting with the stakeholders two weeks ago could not be attended by a lot of the stakeholder because national commitment. There should be some flexibility to try to have another meeting. It should be delayed, not stopping the process, to make sure that everyone is on board and answer some of the anxiety. The producers feel overwhelmed that they are going to have to do a lot and if they don't there will be fines assessed. This is the producers' livelihood, something they have been doing their whole lives. A lot of the feeding operations have been trying to do a good job and are not trying to pollute the waters. Regulations scare some of these producers. By going a little slower and getting those questions out and addressing some of those concerns before it goes to BER it might alleviate some problems later on.

Robert Willems asked if the Department has time to wait?

Tom Reid said the Department would have to evaluate if there is time to wait. The Department will plan to mail out a revised circular with the Council's and stakeholder's comments. The adoption of the federal guidelines is not changing at all. Most of the changes in the circular have been requested to clarify the document. The Department would send it out with the expectation of holding a meeting in the Billings area or somewhere else in eastern Montana to explain the rules. At this additional meeting no changes would be made, because once it goes to the Board the Department has to stop making changes.

Scott Seilstad said that there might be more comments that would lead changes that could be made or haven't been able to be made because of the timeline.

John Schwarz said that if it is written down and the rule clarified, it is hard to disagree with it. In other processes that have gone through, there is a back lash effect. The public hearing process through the rulemaking process could be much more effective if there were additional meetings before hand. The subdivision industry has been regulated for years but the agriculture industry hasn't and will have more of an effect than subdivision rules. The Department has to listen to what EPA says and the Council has to listen to the Department; if the rule has to be done, then it has to be done. If there is a way to prolong this process, it could ultimately result in a better response for water quality.

Tom Reid said that CAFOs were defined in the Clean Water Act in the early 1970s. These rules were published in this format in 1976. It is not a new regulation and is very similar to the old regulation. The circular addresses issues the Department saw with the old regulations.

Steve Pilcher said that on behalf of the Montana Stock Growers Association, there is a huge amount of concern over this rule, not the guidelines because the Department is stuck with them. EPA is not in a position to come in and start enforcing permit programs for CAFOs. Montana Administration Procedure Act does allow for public comment throughout the process, but if there is this level of concern and confusion, it is addressed before the Department brings in 100 people for a hearing before the Board. The Department can spend a little more time and go back and visit with people and get some of these things clarified to their satisfaction or the Department ends up with a hundred people before the Board of Environmental Review.

There are some things that is easy to say that no, these regulations do not go beyond, and are not more stringent than the federal requirements. The Montana statute passed in 1997 specifically required the Department to provide that certification. The agricultural community needs to see that certification to know that is the case. Some things in the rules say these plans have to be submitted by a registered professional engineer. In the Montana public water supply law, there is a requirement that registered professional engineers design public facilities, but where does the authority come from to apply that to these rules? Some of the set back distances, some of the agromomic application rates, and some of the set back distance were relative to public systems and municipal waste systems may not have been intended to apply to a CAFO. Five hundred feet in certain soil is not enough distance and in other soil conditions the depth to ground water may be overkill.

One thing of concern is that the rule says livestock have to be totally fenced off from the creek and cannot have access to state waters. Historically, it has been said that if the state water is the only source of water, the producer needs to provide provisions to make sure the waste accumulation on the surface of the feed lot does not discharge into that water, but the producer can provide a water gap to allow the cattle to go over and water. This option is being taken out and there is a statement in the new rules that says animals may not be allowed to stand in state waters. That is the first step to fencing all of Montana's rivers and streams. If the Department wants a battle, that is where the agricultural community will go. It is not what is intended and it is not what is necessary. That is not the pollution threat that exists out there. There are a lot of issues like this in the rules.

Regarding the reference to certified nutrient management planner; what difference does it make whether the nutrient management plan is submitted by a certified nutrient management planner or submitted by someone else as long as it meets the requirements set forth in the guidelines? There is significant amount of confusion in DEQ 9 as to whether they are guidelines or enforceable conditions. It would help if the document were divided into two sections because it flips back and forth between total confinement operations and open feedlots. In total confinement operations, calculating the total amount of manure generated may be important because it is containing all of it but on an open feed lot it is irrelevant. There are projections of how much is produced but there are no calculations for natural reduction of evaporation and normal trampling that takes place on the lots.

These few things demonstrate there are some issues that need to be discussed. It is suggested that the Department would address these things before going to the Board of Environmental Review. The Department is to be applauded for holding the informational meeting but as mentioned earlier, leaders of the Montana Stock Growers Association and Montana Cattle Feeders Association were at the National Cattleman's Beef Association meeting in Denver that week, so were not able to participate. It is suggested that a meeting in the Billings area, where the Concentrated Feeding Operations on the Yellowstone, should happen to talk to some of these people and clarify some of these issues before the Department sends out the next copy of the circular.

Bill Griffin said that his sense gained from the information gathered in eastern Montana, is that there is a lot of concern. With changes currently being made in the circular, there are a lot of good suggestions out there that could be adopted into the final circular. If the circular goes to the Board of Environmental Review the way it will be with the changes DEQ is currently making, there are going to be a lot more changes that will need to be made. There will be a lot of

people before the Board, and the Board will really have a can of worms. Things should be worked out more and there should be more stakeholder input, MSU input, and agricultural group input. The whole process would work a lot smother if it was put off and there were more stakeholder meetings in different areas of the state. As it is, it will really be a mess when the public hearings before the Board start. Part of the concern could be from confusion and misinformation. There are a lot of things that could be worked out and satisfy a lot of people with just a few meetings so it should be delayed.

Terry McLaughlin said that before the Council makes a motion, note that the Council does not have the authority to tell DEQ to not bring it to BER. The Council can provide a recommendation in a motion of some kind if all the council members feel strongly enough that not all the basis has been thoroughly covered here. In order to eliminate a buzz saw phenomenon when the BER tries to deal with this, it could be very good advice to try to make sure more of the key people and key groups really understand what this is to defuse the situation before the Board has to make that decision. At this time the Council can entertain a motion of some type for recommendation to DEQ.

Barbra Butler asked the Montana Stock Growers Association, why is everyone in the industry shocked, surprised and doesn't seem to know anything about this permit since it has been out there in various publications for agriculture and waste management for quite some time? These publications informed the readers that it was coming and gave a general idea of what it involved.

Steve Pilcher said he was not trying to give the impression that the industry is unaware of the CAFO requirements. Some operations have been permitted. A number of other operations out there may qualify for a CAFO permit. A number of changes have come about because of the federal regulations. For example, the elimination of the exception; there is a conflict because under the Montana Water Quality Act it says that a MPDES permit is required in the event there is a discharge, but under the new federal guidelines, they have taken the exemption out for those facilities that don't discharge. This is creating some confusion. There are a lot of people out there that feel they are in a position where they are not discharging and have been working toward modifications of their operations such that they would not discharge under any condition. This would expand the regulated community with some of the changes. Part of it is some of the producers have continued to stick their head in the sand and this is something they have been slow to adjust to. DEQ has not been in a position to make this a priority and push this with the outreach that it really needs. This is not a total shock to the industry but the reality is the shock that with these changes it may hit home.

Terry McLaughlin said it is inevitable that they will be codified in Montana regulations. It is prudent at this point for DEQ to consider a little additional time for input. EPA always has that hammer hanging out there but probably do not have the resources out there and enforce everything that they expect the state to. It does not mean EPA won't promulgate it, but due to the significance of the issue, it does warrant a little bit of additional time.

Robert Willens said he understands the need to move forward, but agrees to the need to have further input from those really involved. There is some good thought in this to protect the smaller operations and give them a break, but it still needs a little fine-tuning.

Peggy Trenk said that it is not uncommon or unique to any industry to not pay attention until it is crisis time. The Department can move forward with a more final process and keep people on their toes and make them participate or not. In this instance, if people still feel they have a chance for input, they come to the table with a different perspective than when they think the hammer is about to fall. Perhaps a little more time would be better at this point. The Department can approach it as wanting the producers input and will tweak it some more. This can also be done once it goes out for public comment, but it is a different perspective of wanting to hear from the producers and wanting the changes to help the producers as opposed to these are the new rules.

Scott Seilstad made a motion to delay the Council's recommendation until the next meeting to give the Department time to get more input from more stakeholders.

A motion was made and seconded that the Council would delay any recommendations or comments at this time until the Councils next meeting on October 28th to allow additional time for DEQ to do more outreach, receive feedback and solicit input. All present were in favor. The motion carries.

General Public Comment on Water Pollution Control Issues

There were no comments from the public.

Agenda Items for Next Meeting

Terry McLaughlin said the CAFO item will be on the agenda for the next meeting as an action item. The Power Point presentation as a handout is a very good primer and would be good to receive it in the packet of information as a refresher.

Barbra Butler said that it would be good to have a legislative update in October for general issues that DEQ is pursuing.

Adjournment

Terry McLaughlin adjourned the meeting at 12:15 p.m.